



IN THE
Supreme Court of the United States

OCTOBER TERM 1979

No. 79-537

REV. PAUL A. MCDANIEL, CITIZENS FOR COURT
MODERNIZATION, INC., AND JOHN S. GANNON,

Petitioners,

vs.

SELMA CASH PATY, *et al.*,

Respondents.

**RESPONSE TO PETITION
FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF TENNESSEE**

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Tennessee Statutory Provisions Involved	2
Statement of the Cases	3
Reasons for Denying Writ of Certiorari	5
Conclusion	12
Table of Cases Cited	i

Table Of Authorities

Cases Cited

<p>Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 42 L.Ed.2d 141 (1975)</p>	9
<p>Baker v. McCollan, _____ U.S. _____, 99 S.Ct. 1689, 61 L.Ed.2d 433 (1979)</p>	11
<p>Chapman v. Houston Welfare Rights Organization, _____ U.S. _____, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979)</p>	10
<p>Citizens for Court Modernization, Inc. v. Blanton, et al. (Not Reported)</p>	4

Craft v. Memphis Light Gas and Water Division, 534 F.2d 684 (1976)	8
First National Bank of Boston, et al. v. Bellotti, etc., et al.; 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978)	9
Green Street Association v. Dailey, 373 F.2d 1 (C.A. Ill.) cert. den. 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967)	8
Hutto v. Finney, et al., 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978)	9
McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed. 443 (1978)	3,5,7
McKnight v. Southeastern Pennsylvania Transportation Authority, 438 F.Supp. 822 (E.D. Penn. 1977)	9
Orr Trinter, 444 F.2d 279 (6th Cir. 1971) cert. den. 408 U.S. 934, 92 S.Ct. 2827, 33 L.Ed. 767 (1972)	8
Palmer v. Thompson, 391 F.2d 324, 419 F.2d 1222 (C.A. Miss; affirmed with Opinion 403 U.S. 127, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971)	8
Paty v. McDaniel, 547 S.W.2d 897 (Tenn. 1977)	6
Powell v. Power, 436 F.2d 84 (C.A.N.Y. 1970)	8
Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944)	6
State of California v. California & Hawaiian Sugar Co., 588 F.2d 1270 (1979) cert. den. _____ U.S. _____, 99 S.Ct. 2052, 60 L.Ed.2d 660 (1979)	10

Sullivan v. Brown, 544 F.2d 279 (6th Cir. 1976)	8
Wilds v. Coggins, 496 S.W.2d 460 (Tenn. 1974)	6

Constitutional Provisions

Constitution of the United States

First Amendment	5
Fourteenth Amendment	5
Fifteenth Amendment	5

Constitution of Tennessee

Article IX, § 1	3,5
-----------------------	-----

Statutes Cited

Tennessee Code Annotated

§ 2-1932	4
§§ 2-1932, et seq.	7
§ 23-1101	2
§ 23-1101, et seq.	3,4,6,7,8,
§ 23-1102	2
§ 23-1103	3

United States Code

Title 28, § 1257(3)	2
Title 42, § 1973 1 (e)	2,5,7

Title 42, § 1983	5,7,10
Title 42, § 1988	2,5,7,10

Rules of Court

Rules of Tennessee Supreme Court

Rule 31	2,A-1
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Other Authorities

[Tennessee] Journal of the Limited Constitutional Convention of 1977	6
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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

The Respondents make this their response to the Petition For A Writ of Certiorari To The Court of Appeals of Tennessee in this matter now before this Court.

OPINIONS BELOW

The Petitioners have correctly stated that the Court of Appeals of Tennessee has rendered its Opinions on the questions presented in this Petition, and that the Tennessee Supreme Court has denied their Petitions for Certiorari and Discre-

tionary Appeal. The Respondents submit, however, that the opinions have not been published, and in accordance with Rule 31 of the Tennessee Supreme Court, they will not be published. See Appendix A.

JURISDICTION

The Respondents admit that jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(3) inasmuch as rights and privileges are claimed under statutes of the United States.

QUESTION PRESENTED

Are any attorneys fees appropriate under 42 U.S.C. §§ 1988 and 1973 / (e) when there has been no denial of a citizen's rights, privileges or immunities secured by the Constitution of the United States, and as proscribed by 42 U.S.C. § 1983?

TENNESSEE STATUTORY PROVISIONS INVOLVED

Tennessee Code Annotated § 23-1101.

[Definition of person.-] The word "person" wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

Tennessee Code Annotated § 23-1102.

[General power of courts.-] Courts of record within their respective jurisdiction shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding

shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

Tennessee Code Annotated § 23-1103.

[Construction of statutes and written instruments.-] Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

STATEMENT OF THE CASES

The case of *McDaniel v. Paty* was originally filed by Selma Cash Paty against the petitioner, the Rev. Paul A. McDaniel, under the provisions of the Tennessee Declaratory Judgment Act, T.C.A. §§ 23-1101, et seq., for a judicial determination as to whether the Rev. McDaniel could lawfully sit as a Delegate to a Limited Constitutional Convention to be held in 1977 if he were elected to the office, in view of Article IX, § 1, of the Constitution of Tennessee. This Article prohibits Ministers of the Gospel from serving as a member of the Tennessee General Assembly, and it was made applicable to Delegates to the Convention by the enabling legislation providing for the Convention. After the trial court found the disqualifications provisions in Article IX, § 1, to be unconstitutional, the Tennessee Supreme Court in *Paty v. McDaniel*, 547 S.W.2d 897 (1977) reversed the trial court, and held that Article IX, § 1, is justified, and, therefore, constitutional.

Upon perfecting his appeal to this Court, the Petitioner was given a stay of the Tennessee Supreme Court's decree of March 16, 1977, by Mr. Justice Stewart on July 6, 1977. The Petitioner, having been previously elected to the office of Delegate to the 1977 Constitutional Convention, then took the prescribed oath of office, and served in the office until the Convention adjourned sine die.

The case of *Citizens for Court Modernization, Inc., et al. v. Blanton, et al.*, was originally filed by the Petitioner *Citizens for Court Modernization, Inc.*, a general welfare corporation, under the provisions of the Tennessee Declaratory Judgment Act, T.C.A. §§ 23-1101, et seq., for a judicial determination as to whether the Petitioner could use its corporate funds to solicit the views of members as to whether the corporation should take a stand, support, or oppose a new judicial article proposed by the 1977 Constitutional Convention which was to be accepted or rejected by the voters of Tennessee in a referendum on March 7, 1978. The trial record of this case shows that the Respondents to this petition conceded, at the hearing on the Complaint that the Petitioner had a constitutional right to solicit the views of its members about taking a stand on the issue being presented to the public in the referendum election without violating any of the provisions of T.C.A. § 2-1932 regarding corporate funds or credits for the purpose of aiding in the success or defeat of any proposition submitted to a vote of the people.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Since there have been no violations of either of the Petitioners' Civil Rights under the Constitution of the United States and as proscribed by 42 U.S.C. 1983, there is no basis for awarding any attorneys' fees under the provisions of 42 U.S.C. §§ 1973 1 (e) and 1988.

1. *McDaniel v. Paty*

In his Petition, the Rev. McDaniel asserts that he was vindicated by this Court's opinion and Final Judgment. (*McDaniel v. Paty, et al.*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed 443 (1978)). The Respondents respectfully submit that there was no finding by this Court that the Petitioner's Fourteenth and Fifteenth Amendment rights had been violated, as proscribed by 42 U.S.C. § 1983, which would provide a basis for the award of attorneys' fees under 42 U.S.C. §§ 1988 and 1973 1 (e), respectively.

The effect of this Court's opinion in the Petitioner's original appeal is that Article IX, § 1, of the Constitution of Tennessee, denying him the right to sit as a Delegate to the Tennessee Constitutional Convention in 1977, was an infringement of his fundamental right for the "free exercise of religion." as protected by the First Amendment to the Constitution of the United States. Only one of the Justices, Mr. Justice Stewart, made any reference at all to a possible chilling effect on any citizen's voting rights, as protected by the Fourteenth Amendment to the Constitution of the United States.

When the Petitioner sought the office of Delegate to the 1977 Constitutional Convention, he was exercising a right incident to State citizenship, and not one incident to federal rights that carry over to citizens of the various states. In construing the rights of citizens with reference to citizenship and the right to

hold public office, this Court has further said in the case of *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944) that

The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to State citizenship and derived solely from the relationship of the citizen and his State established by State laws. [Cases cited are omitted].

* * *

More than forty years ago this Court determined that an unlawful denial by State action of a right to State political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor and Marshall v. Beckham*, 178 U.S. 548, 20 S.Ct. 1009, 44 L.Ed. 1187. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion. *Cane v. State of Missouri ex rel. Newell*, 246 U.S. 650, 38 S.Ct. 334, 62 L.Ed. 921 [1918], as we reaffirm it now.

In this case now before this Honorable Court, the Complaint was filed under the provisions of T.C.A. §§ 23-1101, *et seq.*, the Tennessee Declaratory Judgment Act, for the legal determination of whether the Rev. McDaniel could serve in the 1977 Limited Constitutional Convention. Even though the Tennessee Supreme Court had ruled against him through the normal judicial process, *Paty v. McDaniel*, 547 S.W.2d 897 (1977), the Petitioner, by virtue of the stay granted by Mr. Justice Stewart, took the Oath of Office as a Delegate to the Constitutional Convention from his home district, from which he was elected in 1976, and served and took an active part in the Convention until it adjourned *sine die*. See: *Wilds v. Coggins*, 496 S.W.2d 460 (Tenn. 1974), and the *Journal of the Limited Constitutional Convention of 1977*.

2. **Citizens For Court Modernization, Inc.
and John S. Gannon v. Paty, et al.**

In their Jurisdictional Statement, the Petitioners assert that the Tennessee Courts should have taken jurisdiction of this case under 42 U.S.C. §§ 1983, and should have awarded a reasonable attorney's fee, as provided in 42 U.S.C. §§ 1973 *1* (e) and 1988. The Respondents respectfully submit to this Honorable Court that there was no error on the part of the Court of Appeals when it refused to reverse the Chancellor for failure to award the Petitioner any attorney's fee under 42 U.S.C. §§ 1973 *1* (e) and 1988.

As in the *McDaniel v. Paty, supra*, case, these Petitioners sought a legal determination of their legal rights under the provisions of the Tennessee Declaratory Judgment Act, T.C.A. § 23-1101, *et seq.* as to whether they could solicit the views of their members, and whether they wanted to set up a separate fund to support or oppose a proposed constitutional amendment affecting the Tennessee judicial system, and not violate the provisions of T.C.A. §§ 2-1932, *et seq.*, pertaining to the use of corporate funds.

After the Attorney General of the State conceded that these petitioners had a legal right to obtain the views of their members without violating T.C.A. § 2-1932, the trial court during a short hearing made the understanding a matter of record, and there was no appeal from that determination.

In view of this finding and the rule of law established by this action, the Respondents respectfully submit that, as in the *McDaniel v. Paty, supra*, case there has been no violation of the Petitioner's constitutional rights, or those protected by 42 U.S.C. 1983.

The Award of Attorney's Fees

In view of the fact that only persons who have been deprived of their individual civil rights may seek redress of such rights, there is no basis for the Petitioners to recover any attorney's fees. *Palmer v. Thompson*, 391 F.2d 324, and on rehearing 419 F.2d 1222 (C.A. Miss.); affirmed with opinion, 403 U.S. 127, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971) and *Green Street Association v. Daily*, 373 F.2d 1 (C.A. Ill.), cert. den. 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967). See also *Powell v. Power*, 436 F.2d 84 (C.A.N.Y. 1970).

If the Petitioners have any claim that they have been deprived of any right under the Civil Rights Acts, they must show that some action was taken that would have deprived them of a constitutional right under color of a State Law. *Orr v. Trinter*, 444 F.2d 128 (6th Cir. 1971), cert. denied 408 U.S. 934, 92 S.Ct. 2847, 33 L.Ed.2d 767 (1972). See also: *Sullivan v. Brown*, 544 F.2d 279 (6th Cir. 1976). The United States Sixth Circuit Court of Appeals has recently stated in the case of *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (1976), that

[T]he Fourteenth Amendment requires due process only if "State action" is "depriv[ing] any person of life, liberty or property." See, e.g. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 735-36, 42 L.Ed. 725, 735 (1975); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 357, 95 S.Ct. 449, 453-57, 42 L.Ed.2d 477, 483 (1974).

It is respectfully submitted that the facts and circumstances involved in these cases do *not* warrant the award of any attorney fees under the Civil Rights Acts. As previously stated, the records in these cases (1) show that the actions were brought under the Declaratory Judgment Act of Tennessee, T.C.A. §§ 23-1101, *et seq.*, for a legal determination of their prospective legal rights, and (2) do not show that any of the civil rights of the Petitioners have been violated. The final results of the litiga-

tion were that Rev. McDaniel's rights to serve in the 1977 Limited Constitutional Convention were determined without any possible civil rights being violated, and that the Citizens for Court Modernization, Inc., could obtain the views of its members without violating any penal law. The propriety of this procedure was carefully considered and approved by the Court in the case of *McKnight v. Southeastern Pennsylvania Transportation Authority*, 438 F.Supp. 822 (E.D. Penn. 1977).

The Petitioners, Citizens For Court Modernization and John S. Gannon, have further asserted that they were vindicated in its claim for the right to expend corporate funds to contact its members to obtain their views on the political issue submitted to the voters for their consideration on March 7, 1978, by the recent case of *First National Bank of Boston v. Bellotti, etc., et al.*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). The Respondents respectfully submit that this case does not apply to the Petitioner's case for attorneys' fees for the reason that before the time that the *Bellotti* decision was announced, the Petitioner already had the decision that it wanted from the Chancellor on February 24, 1978.

The Petitioners have cited the case of *Hutto v. Finney, et al.*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), as authority for an equity court to award attorney's fees to a successful litigant in a civil rights case. The Respondents take no exceptions to this point, but submits that it must be applied only to such appropriate cases as would warrant such an award. In the *Hutto* case, the Federal Courts found that correction officials in Arkansas *had acted in bad faith* in their failure to correct constitutional violations of prisoners' rights, and held that the award of attorneys' fees by an equity court was proper, citing *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 258-259, 95 S.Ct. 1612, 1622, 42 L.Ed.2d 141 (1975) and other cases, and the fact that [t]he award vindicated judicial authority without resort to the more drastic sanctions available for contempt of court and makes the prevailing party whole for ex-

penses caused by his opponent's obstinacy." Footnote No. 14, (98 S.Ct. 2565, at 2573). There is absolutely no evidence of any bad faith on the part of the Respondents in these cases to use as any basis for the award of any attorneys' fees under the Civil Rights Acts.

During its last term, this Court made three decisions that have a bearing on the Petitioners' claims in these cases. In the case of *State of California v. California & Hawaiian Sugar Co.*, 588 F.2d 1270 (1979), the Ninth Circuit Court held that since the cause of action arose under the laws of the State of California, and not the Federal Civil Rights Acts, there was no basis for awarding attorneys' fees under the provisions of 42 U.S.C. 1973 I (e), 1983, and 1988. On appeal this Court denied certiorari. _____ U.S. _____, 99 S.Ct. 2052, 60 L.Ed.2d 660 (April 30, 1979). In the case of *Chapman v. Houston Welfare Rights Organization*, _____ U.S. _____, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (May 14, 1979), Mr. Justice Stevens, speaking for the Court, held that

We cannot accept claimants' argument that we should reach this result by holding that § 1983 is an act of Congress "providing for equal rights" within the meaning of § 1343(3). Unlike the 1866 and 1870 Acts," § 1 of the Civil Rights Act of 1861 did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to ensure that an individual had a cause of action for violations of the Constitution, which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by § 1 of the 1866 Act.³⁴ No matter how broad the §1 cause of action may be, the breadth of its coverage does not alter its procedural character. Even if petitioners are correct in asserting that § 1983 provides a cause of action for all federal statutory claims, it remains true that one cannot go into court and claim a "violation of § 1983" - for § 1983 by itself does not protect anyone against

anything. As Senator Edmunds recognized in the 1871 debate, "All civil suits, as every lawyer understands, which this act authorizes, are not based upon it; they are based upon the right of the citizen. The act only gives a remedy."³⁵

* * *

We reach a similar conclusion with respect to the argument that § 1983 is a statute "providing for the protection of civil rights, including the right to vote." Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all. To be sure, it may be argued that § 1983 does in some sense "provid[e] for the protection of civil rights" when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke § 1983 to meet the "civil rights" requirements of § 1343(4); the act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test.³⁶ It is only when the underlying statute is *not* a civil rights act that § 1983 need be invoked by those in claimants' position to support jurisdiction. And in such cases, by hypothesis, § 1983 does not "provid[e] for the protection of civil rights." (Footnote citations have been omitted).

In the third case, *Baker v. McCollan*, _____ U.S. _____, 99 S.Ct. 1689, 61 L.Ed.2d 433, (1979) this Court again held, in a case involving a tortious false imprisonment by a State official [Sheriff], that

Having been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under § 1983.

CONCLUSION

A private litigant in the State of Tennessee is ordinarily liable for his own attorneys' fees unless there is a fiduciary relationship involved in the action, or there is a statutory basis for the award of attorneys' fees.

The Federal Civil Rights Acts provide a means whereby a person whose Federal Constitutional Rights have been violated may use the Courts to enforce those rights, but those Acts provide no substantive rights. The record of these cases show that no constitutional rights of the Petitioners were violated, and, therefore, there is no basis for the award of any attorneys' fees. Even if it is assumed that the Federal Civil Rights Acts contain any substantive provision of law that could have been violated, there is no evidence of bad faith on the part of the Respondents that would enable the Petitioners to recover any attorneys' fees under the Federal Civil Rights Acts.

For all of the reasons as stated in this Response to the Petitioners' Petition for a Writ of Certiorari, the Respondents respectfully submit that this Honorable Court should refuse to review this case any further, and should deny the Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

TENNESSEE SUPREME COURT RULES

Rule 31

Publication of Opinions—Citation of Unpublished Opinions Prohibited.—1. The clerks of this Court will promptly record the written opinions delivered by the Court, and they shall not suffer them to be taken from their offices until they are recorded. A copy of the opinions, ordered to be published, shall be delivered to the Attorney General and Reporter as soon as enrolled.

2. The standards for determining whether opinions of the Supreme Court shall be designated for publication are:

a. The opinion establishes a new rule of law or alters or modifies an existing rule; or

b. The opinion involves a legal issue of continuing public interest; or

c. The opinion criticizes existing law; or

d. The opinion resolves an apparent conflict of authority; or

e. The opinion updates, clarifies or distinguishes a principle of law.

3. Opinions of the Court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out above is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published along with the main opinion, if the dissenting judge determines that a standard for publication as set out above is satisfied. If the standards for publication as set out above are satisfied as to only a part of an opinion, only that part shall be published.

4. No opinion of the Court of Appeals or the Court of Criminal Appeals shall be published until after the time has expired for the filing of a petition for the writ of certiorari. If this Court grants the writ, or denies the writ of certiorari, concurring in result only, the opinion of the intermediate court shall not be published.

5. All opinions that are not found to satisfy a standard for publication as prescribed in paragraph two (2) shall be marked *Not Designated For Publication*. No opinion so designated shall be cited in any court unless a copy thereof shall be furnished to the court and to adversary counsel.